

Memorandum

To : Edward W. King, Chief
Fuel Taxes Division (MIC:33)

Date: September 5, 2006

From : Carolee D. Johnstone
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Subject: Request for Opinion Regarding Use of Dyed Diesel Fuel on Public Streets on Behalf of Customers Engaged in Street Sweeping Operations

In a memorandum dated March 8, 2006, you asked that my prior letter regarding the above-referenced subject and the application of the Diesel Fuel Tax Law be reissued to reaffirm the analysis therein. The prior letter, dated September 22, 2005, specifically addressed a question posed by a fuel distributor on behalf of two customers who operated street sweeping companies. These two customers owned street sweeping vehicles that were registered as "special equipment" with the California Department of Motor Vehicles (DMV). These customers wanted to know if, as they have been told, they may "legally" operate those street sweeping vehicles on city streets using untaxed dyed diesel fuel, as long as they stay within 17 miles of their places of business.

The legal opinion expressed in my prior letter dated September 22, 2005, is still valid.

The fuel distributor confirmed that both customers' street sweepers carried "Special Equipment" (SE) plates. Further, at least one of the customers used his sweeper to clean up new construction areas, particularly in new developments, almost exclusively within city limits. However, it was unknown if either customer was registered with the Board as a "qualified highway vehicle operator" or had a "qualified highway vehicle operator" certificate or license, as defined in the Diesel Fuel Tax Law, discussed below. Further, the fuel distributor did not then sell dyed diesel fuel to these customers.

DMV staff has referenced, as potentially relevant to the question posed, the following statute in the California Vehicle Code, which states:

"Special construction equipment" is: . . . (b) Any vehicle which is designed and used primarily either for grading of highways, paving of highways, earth moving, and other construction work on highways . . . , and which is not designed or used primarily for transportation of persons or property and which is only incidentally operated or moved over the highway. It includes, but is not limited to, [as is relevant here,] road . . . construction and maintenance machinery so designed and used such as . . . asphalt spreaders, . . . crawler tractors, . . . leveling graders, finishing machines, motor graders, . . . road rollers, . . . water wagons, . . . skip loaders, weed mowers, . . . and other similar types of construction equipment. (Veh. Code, § 565, subd. (b) [emphasis added].)

According to the DMV, a street sweeper is considered to be "special construction equipment" and may obtain a SE plate from the DMV if the street sweeper is "only incidentally operated or moved" on highways. Since both customers' sweepers are permitted to carry SE plates, we assume for purposes of this discussion that the street sweepers in question are being operated or moved only incidentally on highways.

With regard to the use of untaxed dyed diesel fuel¹ on California highways, if the owners or operators of these street sweeper vehicles are registered with the Board as "qualified highway vehicle operators," then the owners or operators may use untaxed dyed diesel fuel to operate their street sweeper vehicles on the highway.

"Dyed diesel fuel" is defined to mean:

[D]iesel fuel that is dyed under United States Environmental Protection Agency [EPA] or the Internal Revenue Service [IRS] rules for high sulphur diesel fuel or low sulphur diesel fuel or any other requirements subsequently set by the [EPA] or the [IRS] and considered destined for nontaxable, off-highway uses. (Rev. & Tax. Code § 60031 [emphasis added].)

Dyed diesel fuel is exempt from state excise tax if it meets certain EPA and IRS requirements. (See Rev. & Tax. Code, § 60101, subds. (a) & (b).) Further:

No person shall operate or maintain a motor vehicle on any public highway in this state with dyed diesel fuel in the fuel supply tank. [However, t]his subdivision does not apply to uses of dyed diesel fuel on the highway that are lawful under the Internal Revenue Code or regulations promulgated thereunder, if the person is registered as a qualified highway vehicle operator (Rev. & Tax. Code, § 60101, subd. (c) [emphasis added].)

A "qualified highway² vehicle operator" is defined as:

[A]ny person licensed [with the Board] as a qualified highway vehicle operator that owns, operates, or otherwise controls a diesel-powered highway vehicle and delivers, or causes to be delivered, diesel fuel or any liquid into the fuel tank of a diesel-powered highway vehicle and is qualified to use dyed diesel fuel on the highway by the [IRS] under Section 48.4082-4 of Title 26 of the Code of Federal Regulations. (Rev. & Tax. Code, § 60027 [emphasis added].)

¹ Diesel fuel on which tax has not been imposed may be dyed various colors, including red, to differentiate it from "clear" diesel fuel on which tax has been imposed.

² "Highway" includes any way or place, of whatever nature, that is publicly maintained and open to the use of the public for purposes of vehicular travel." (Rev. & Tax. Code, § 60016.)

In other words, a qualified highway vehicle operator may use untaxed dyed diesel fuel, which is intended for nontaxable, off-highway uses, to incidentally operate or move a diesel-powered highway vehicle on the highway if he or she also meets the IRS requirements. Section 48.4082-4 of Title 26 of the Code of Federal Regulations (CFR) provides that the tax imposed on diesel fuel at the time of delivery into the fuel tank of a diesel-powered highway vehicle does not apply if the fuel is for "use in a highway vehicle that":

- (i) Is not registered (and is not required to be registered) for highway use under the laws of any State . . . ; and
- (ii) Is used in the operator's trade or business (26 C.F.R. § 48.4082-4(c)(6) [emphasis added].)

As discussed previously, the DMV considers street sweepers to be "special construction equipment," pursuant to Vehicle Code section 565, subdivision (b). As such, they are "exempt from registration." (Veh. Code § 4010 [emphasis added].) Since it is presumed, for purposes of this discussion, that the customers use the street sweepers in their trade or business, it appears that their street sweepers would fulfill the requirements of section 48.4082-4(c)(6) of Title 26 of the CFR as referenced above.

With regard to California excise taxes, if the street sweepers meet the requirements of section 48.4082-4(c)(6) of title 26 of the CFR, the customers may be eligible to apply to the Board for licenses as "qualified highway vehicle operators" and to use dyed diesel fuel on the highway, pursuant to Revenue and Taxation Code sections 60027 and 60031, as quoted above. However, even though they may use dyed diesel fuel, on which no excise taxes have been paid, on the highway, the customers should be aware that they are still liable for backup taxes on any fuel they use on a highway, even incidentally, such as when traveling to a job or from job to job.

Under California law, a qualified highway vehicle operator is liable for the excise tax on dyed diesel fuel, which is imposed as a "backup tax" pursuant to Revenue and Taxation Code section 60058, subdivision (a), whenever he or she operates a diesel-powered highway vehicle on the highway. The "backup tax" relevant here is the tax imposed on diesel fuel, "[o]n the delivery into the fuel tank of a diesel-powered highway vehicle of . . . [a]ny diesel fuel that contains a dye [and] . . . [a]ny liquid on which tax has not been imposed by [the Diesel Fuel Tax Law, the Motor Vehicle Tax Law, or the Use Fuel Tax Law]." (Rev. & Tax. Code § 60058, subd. (a)(1) & (3) [emphasis added].) However, backup tax does not apply to delivery of diesel fuel into the fuel tank of a diesel-powered highway vehicle that is operated off-highway. (Rev. & Tax. Code, § 60100, subd. (a)(5)(C).)

With regard to the sale of dyed diesel fuel, if the fuel distributor delivers dyed diesel fuel directly into the fuel supply tank of these street sweepers, it should obtain and retain a copy of each customer's "qualified highway vehicle operator" license, in order to avoid incurring any potential tax liability.

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In sum, since the DMV has determined that the customers' street sweepers qualify as "special construction equipment," which is "only incidentally" operated or moved on the highway, the customers in question may apply to the Board for licenses as "qualified highway vehicle operators" and purchase dyed diesel fuel for use on the highway in their street sweepers. However, they must still report and pay the backup tax on untaxed dyed diesel fuel that they use while operating or moving a diesel-powered highway vehicle, i.e., their street sweepers, on a state highway.

As a final note, Board staff is not aware of any provision in the applicable federal or California statutes or regulations that addresses or makes any provision for the operation of special equipment vehicles on public highways within 17 miles of an operator's place of business.

If you have any questions regarding the information provided above, please do not hesitate to contact me at the above-referenced number.

cc: Lou Feletto (MIC:33)
Doug Shepherd (MIC:65)
Arlo Gilbert (MIC:33)
Todd Keefe (MIC:56)
Randy Ferris (MIC:82)